DOCKET FILE COPY ORIGINAL

RECEIVED
SEP 2 2 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	
End User Common Line Charges	)	CC Docket No. 95-72

U S WEST, INC. REPLY TO OPPOSITIONS TO PETITION FOR PARTIAL STAY PENDING JUDICIAL REVIEW

U S WEST, Inc. ("U S WEST") hereby submits its reply to the oppositions filed against its Petition for Partial Stay Pending Judicial Review of the Federal Communications Commission's ("Commission") First Report and Order in the above-captioned dockets.[1]

In its stay request, U S WEST demonstrated that permitting competitors which do not use U S WEST's transport to avoid payment of the implicit universal service and tandem switch support contained in the residual transport interconnection charge ("RTIC") is arbitrary, capricious, and discriminatory. The four parties opposing U S WEST's stay request posit that the Commission's

[1] In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 7 Comm. Reg. (P&F) 1209 (1997) ("First Report and Order"), appeals pending sub nom. Southwestern Bell Telephone Company v. FCC, Nos. 97-2618, et al. (8th Cir.).

modified RTIC rule will encourage competition in the transport market when, in fact, the implementation of a discriminatory method of collecting implicit universal service support will have the opposite effect.[2] That is, competition based solely on universal service support avoidance is not true competition. If the discriminatory RTIC rule is permitted to take effect, universal service will be disrupted and U S WEST's business relationships with its existing and potential transport customers will be irreparably harmed.

As U S WEST pointed out in its stay request, the rule in question permits U S WEST's competitors to artificially avoid implicit universal service support contained in the RTIC by providing their own transport. In effect, the opposing parties would gain an unfair competitive advantage over U S WEST by leveraging the fact that there is no explicit universal service support mechanism in place for rural high-cost transport. MCI and the resale carriers represented by TRA, for example, would be able to evade payment of the implicit universal service support contained in the RTIC by simply shifting their traffic away from U S WEST-provided transport to competitive access provider ("CAP")-provided transport. For their part, CAPs such as LBC and TCG would have a tremendous artificial price advantage over U S WEST in the transport market because of their exemption from contributions to implicit universal support.[3] Thus, U S WEST's stay request serves

---

[2] Oppositions were filed by MCI Telecommunications Corporation ("MCI"), LBC Communications, Inc. ("LBC"), Teleport Communications Group, Inc. ("TCG"), and the Telecommunications Resellers Association ("TRA").

[3] MCI and TRA are so anxious to reap the financial benefits to be gained from avoiding implicit universal service contributions that they have filed petitions for

the public interest by preserving adequate funding for universal service support.

I. U S WEST IS LIKELY TO SUCCEED ON THE MERITS

U S WEST has submitted extensive evidence in this and other proceedings demonstrating that the primary component of its RTIC is implicit universal service support. The opposing parties do not challenge U S WEST's showing. Instead, MCI and LBC argue that the cost of providing rural transport is not a universal service cost because rural transport historically has not been supported by universal service funds.[4] But this argument only proves U S WEST's point. The fact that rural transport is not included in the current universal service fund merely illustrates that it receives implicit support through the RTIC rather than explicit support.

In the First Report and Order, the Commission itself acknowledged that "the additional costs of rural transport currently are recovered through the TIC."[5] Accordingly, MCI's and LBC's semantic arguments notwithstanding, the Commission has a statutory obligation to replace the implicit universal service support contained in the RTIC with explicit support that is both equitable and nondiscriminatory.[6] The Commission's method of assessing implicit universal

---

reconsideration in this proceeding supporting an immediate exemption from the RTIC

[4] MCI Opposition at 8; LBC Opposition at 3.

[5] First Report and Order, 7 Comm. Reg. at 1270 ¶ 226. MCI also concedes that rural transport costs are likely included in the TIC. MCI Opposition at 8.

[6] 47 U.S.C. § 254(b)(4).

support also must be "sufficient" and "predictable."[7] Thus, the Commission cannot simply ignore the implicit universal service support contained in the RTIC or address the issue in a future rulemaking proceeding as urged by the opposing parties.[8]

The Commission's recovery of the implicit support contained in the RTIC from all transport customers does not result in a subsidy of U S WEST's provision of transport in competition with CAP-provided transport.[9] Rather, the RTIC provides implicit support for purchasers of tandem switch service and purchasers of transport in rural high-cost areas.[10] The fact that these costs could be categorized as transport-related is irrelevant. What matters is that the costs contained in the RTIC are unrelated to U S WEST's cost of providing transport that competes with, and would be replaced by, CAP-provided transport. Thus, in the absence of a stay, U S WEST actually will be forced to subsidize CAPs and CAP customers who avoid

---

[7] 47 U.S.C. § 254(b)(5).

[8] See, e.g., TCG Opposition at 8-9. MCI's statement that rural transport will not be supported by universal service funds in the future is premature, given that the Commission's universal service rulemaking proceeding is ongoing. In any event, rural transport support need not be included in the universal service fund per se – it may be funded through a separate flat-rate charge as U S WEST has proposed.

[9] MCI Opposition at 10.

[10] MCI asserts erroneously that costs to be reassigned to facilities-based charges in the future (e.g., tandem switching costs) cannot be included in the RTIC. MCI Opposition at 5 n.4. This argument ignores the Commission's unambiguous statement in the First Report and Order that, beginning on January 1, 1998, "all tandem-switching revenues currently allocated to the TIC [must be reallocated] to the tandem switching rate element" in three annual steps. After this adjustment, "the TIC will not recover any costs that are attributable to tandem switching." First Report and Order, 7 Comm. Reg. at 1268 ¶ 218. Accordingly, U S WEST's

payment of the implicit support contained in the RTIC by providing their own transport.

II. U S WEST WILL SUFFER IRREPARABLE HARM ABSENT A STAY

U S WEST's business relationships with existing and potential customers will be irreparably harmed if the Commission's discriminatory RTIC rule is allowed to take effect. The opposing parties do not (and cannot) deny that current U S WEST customers will shift much, if not all, of their traffic from U S WEST's transport to reap the financial benefits of RTIC avoidance. In fact, the parties' ability to benefit from this regulatory anomaly seems to motivate their opposition to the stay. Once U S WEST's customers have shifted traffic to carriers such as the opposing parties in order to avoid the RTIC, it will be extremely difficult for U S WEST to recapture these customers, and it will be absolutely impossible for U S WEST to recoup its lost revenues.[11]

U S WEST currently faces significant competition in the transport market. As shown in the attached chart, 60 percent of U S WEST's switched access currently is subject to high or medium levels of competition (i.e., there are two or more CAPs in the market), and 20 percent is subject to a lower level of competition (i.e., there is only one CAP in the market). U S WEST has calculated, based only on existing

---

RTIC will continue to recover a portion of tandem switching costs for a three-year period.

[11] See Iowa Utilities Bd. v. FCC, 109 F.3d 418, 426 (8th Cir. 1996) (holding that the threat of unrecoverable economic loss qualifies as irreparable harm); Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 552 (4th Cir. 1994) (holding that the possibility of permanent loss of customers to a competitor or the loss of goodwill satisfies the irreparable injury prong).

CAP levels, that $115 million of its RTIC is at immediate risk in markets where U S WEST faces high or medium levels of competition and $77 million is at risk where there is a lower level of competition. Additionally, $35 million of U S WEST's transport revenue is at immediate risk in markets where U S WEST faces high or medium levels of competition and $23 million is at risk where there is a lower level of competition. These immediate potential losses are based on actual (not theoretical) levels of competition in the transport market.[12]

MCI's assertion that U S WEST can avoid losing its customers by setting its transport rates at a level which does not include the RTIC reflects a fundamental misunderstanding of the issue.[13] The forgone revenues represent universal service support. Moreover, the Commission's price cap rules would not allow U S WEST or any other price cap LEC to increase transport prices to fully recover revenue that currently is being recovered through the RTIC. In fact, U S WEST's RTIC is considerably larger than the revenues generated by its transport services. Therefore, even if U S WEST chose to not increase transport rates to that level (an easy decision since it does not have the ability under price cap rules to increase rates) or to lower its transport rates, U S WEST's customers would still switch to CAP-provided transport to avoid payment of the RTIC. Even if U S WEST charged nothing for transport services, it would still lose business because of the tremendous universal service subsidies contained in its current RTIC.

---

[12] TCG Opposition at 10; TRA Opposition at 3-4.

[13] MCI Opposition at 14; LBC Opposition at 3.

Likewise, MCI's and LBC's claim that U S WEST can eliminate the implicit rural transport support contained in the RTIC by deaveraging its transport rates is greatly exaggerated.[14] First, the Commission's rules require that LECs meet certain thresholds of competition before they are permitted to deaverage their switched transport for a particular study area.[15] U S WEST to date has met the threshold in only eight of the fourteen states within its region, and does not anticipate gaining the ability to deaverage switched transport rates in the remaining six states in the near future. Second, the Commission's price cap restraints limit the extent to which rates can be deaveraged. Third, deaveraging of switched transport rates is limited by the need (for both business and regulatory purposes) to correlate switched access and private line rates. Fourth, and most importantly, it is an absurd proposition to assume that U S WEST could reallocate its entire RTIC into its deaveraged transport rates, given that U S WEST's RTIC is considerably larger than the revenues generated by its tandem and direct transport rates.

III. GRANT OF A STAY WILL NOT HARM OTHERS

Continuing to distribute the burden of the implicit support contained in the RTIC equitably among all customers purchasing U S WEST's switched access services will not cause any harm to third parties. The only harm that the opposing parties have identified is that they will be prevented from receiving the discriminatory price break that they are expecting. However, CAPs and CAP

---

[14] MCI at 15.

customers have no right to receive an unfair competitive advantage by avoiding payment of non-discriminatory implicit universal service support. Thus, the opposing parties cannot claim any legitimate harm if the Commission grants U S WEST's stay request.

IV. GRANT OF A STAY SERVES THE PUBLIC INTEREST

The Commission's grant of a stay serves the public interest by preserving the implicit universal service support that will be lost if the discriminatory RTIC rule is allowed to take effect. U S WEST fully supports the replacement of implicit universal service support (such as the RTIC) with explicit support that is "specific, predictable and sufficient."[16] The Commission's Universal Service Order, however, delays this explicit support until 1999. This does not mean that the Commission could lawfully abandon universal service during this period. To the contrary, the Commission has a statutory obligation to ensure the continued full funding of the implicit universal service support contained in the RTIC until universal service issues have been resolved or the RTIC has been eliminated.

In addition, grant of a stay will preserve fair competition in the transport market that is based on economic factors such as price, quality of service, and efficiency. As Ameritech noted in its comments supporting U S WEST's stay request, the Commission's discriminatory RTIC rule will likely hinder, rather than

---

[15] In the Matter of Federal-State Joint Board on Universal Service, Report and Order, 7 Comm. Reg. (P&F) 109 (1997), appeals pending sub nom. Texas Office of Public Utility Counsel v. FCC, Nos. 97-60421, et al. (5th Cir.).

[16] 47 U.S.C. § 254(b)(5).

promote, competition on true economic terms."[17] Once the Commission creates this type of false market incentive, it is very difficult to undo the harm that is caused. A prime example is taking place in this proceeding, where small IXCs are fighting vigorously to continue recovering 80 percent of tandem switching costs through the RTIC so that tandem switching charges are not increased.[18]

For these reasons, the Commission should deny the oppositions and grant U S WEST's stay request.

Respectfully submitted,

U S WEST, INC.

By: Jeffry A. Brueggeman

Robert B. McKenna
Jeffry A. Brueggeman
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2861

Its Attorneys

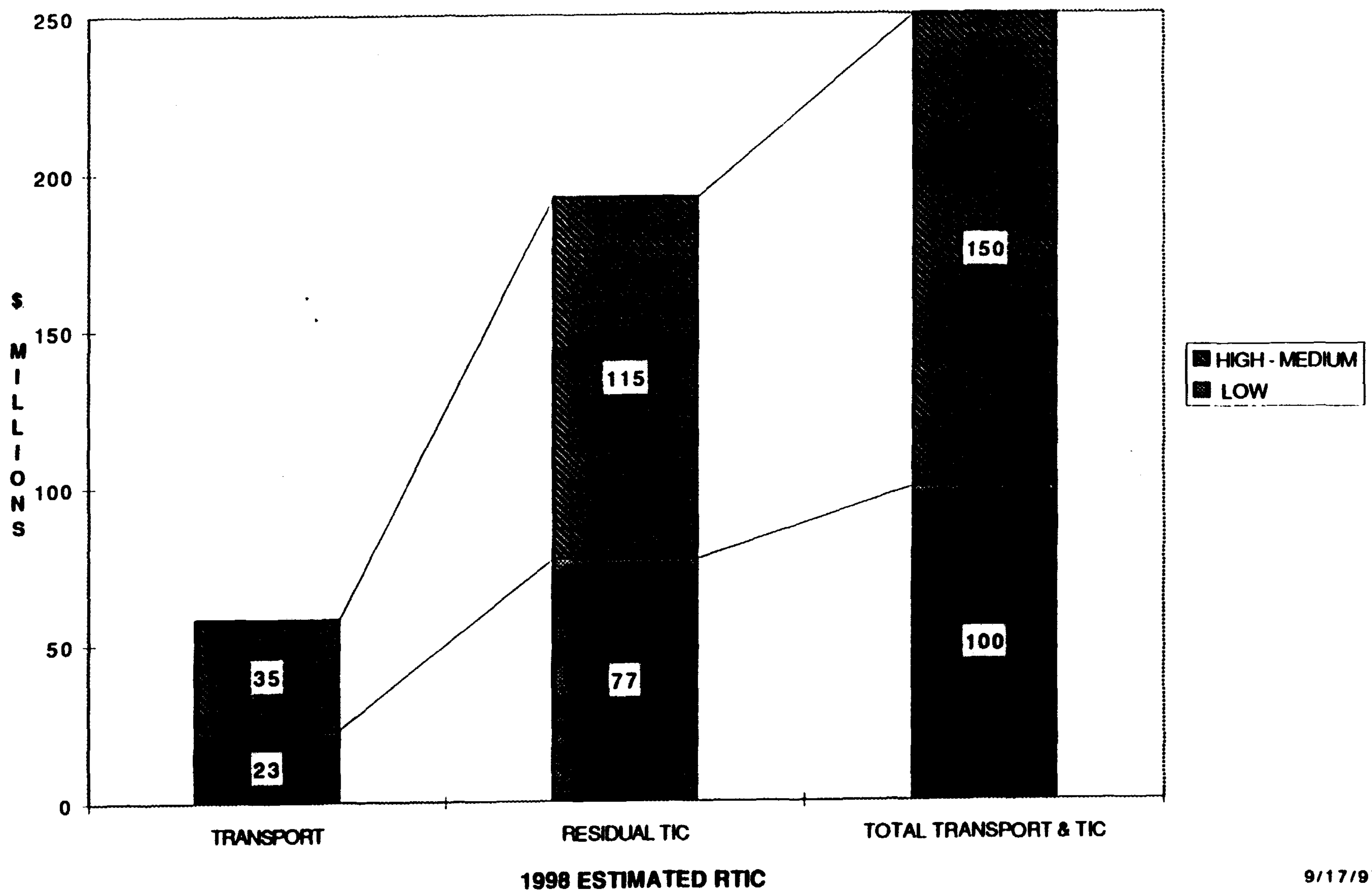
Of Counsel,
Dan L. Poole

September 22, 1997

[17] Ameritech Comments at 2.

[18] See, e.g., Petition for Reconsideration filed July 11, 1997, by Competitive Telecommunications Association, CC Docket No. 96-262, at 8-9

U S WEST POTENTIAL 1998 LOSSES RESULTING FROM DISCRIMINATORY RTIC RULE



9/17/97

U S WEST's LEVEL OF EXISTING CAP ALTERNATIVES IN KEY GEOGRAPHIC MARKETS AND RELATIVE % OF SWITCHED ACCESS

		LEVEL OF COMPETITIVE ALTERNATIVES		
STATE	MSA	HIGH (4+ CAPs)	MEDIUM (2 - 3 CAPs)	LOW (1 CAP)
Arizona	Phoenix	X		
	Tucson		X	
	Mesa			X
Colorado	Boulder			X
	Colorado Springs		X	
	Denver	X		
	Longmont			X
	Greeley			X
Iowa	Des Moines		X	
Idaho	Boise		X	
Minnesota	Minneapolis	X		
Nebraska	Omaha		X	
New Mesico	Albuquerque		X	
Oregon	Portland	X		
Utah	Salt Lake City	X		
Washington	Seattle	X		
	Spokane		X	
	Tacoma		X	
% OF U S WEST SWITCHED ACCESS		42%	18%	20%

9/17/97

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 22nd day of September, 1997, I have caused a copy of the foregoing **U S WEST, INC. REPLY TO OPPOSITIONS TO PETITION FOR PARTIAL STAY PENDING JUDICIAL REVIEW** to be served via first-class United States Mail, postage pre-paid, upon the persons listed on the attached service list.

Kelseau Powe, Jr.

*Served via hand-delivery

(CC96262h.COS/BM/ss)

*Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

*James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

*Susan P. Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

*Rachelle B. Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

*Chief, Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

*James D. Schlichting
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*Wanda Harris
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*David Hunt
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*International Transcription
Services, Inc.
1231 20th Street, N.W.
Washington, DC 20036

Jonathan B. Sallet
Bradley C. Stillman
MCI Telecommunications, Inc.
1801 Pennsylvania Avenue, N.W.
Washington, DC 20006

W. Kenneth Ferree LBC
Goldberg, Godles, Wiener &
Wright
1229 19th Street, N.W.
Washington, DC 20036

Michael S. Pabian
Ameritech Operating Companies
Room 4H82
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025

Donald B. Verrilli, Jr. MCI
Nory Miller
Jenner & Block
601 13th Street, N.W.
Washington, DC 20005

Teresa Marrero
Teleport Communications Group, Inc.
Suite 300
Two Teleport Drive
Staten Island, NY 10311

Charles C. Hunter TRA
Catherine M. Hannan
Hunter Communications Law Group
Suite 701
1620 I Street, N.W.
Washington, DC 20006